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The Trial Brief

Edson R. Sunderland

BRIEF MAKING

AND

THE USE OF LAW BOOKS

BY

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PART IV

THE TRIAL BRIEF

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CHAPTER XXV

THE TRIAL BRIEF

§ 1. Introduction

The object of the preceding chapters is to show the brief maker where to find the material for his brief, how to find it, and how to select out of the mass of material found that which will be suitable for his use.

The purpose of this search for and selection of material is to make a proper presentation to the court of the controversy in relation to which a final adjudication is desired. Hence it is necessary now that we should point out the way the material collected should be used to the best advantage.

It is obvious that there are two uses to which this material may be put. It may be used on the trial of the action, and again on the hearing of an appeal from the judgment of the trial court, if such appeal is taken. A discussion of the methods of handling the material for the presentation of the case on appeal will be found in the succeeding lesson. The purpose of this lesson is to outline a course of investigation suitable to the preparation of a case for trial, and to suggest methods of making the material collected during the search for authorities readily available. As these lessons are not intended to teach trial prac-

tice, an extended discussion of the general subject of "Preparation for Trial" would manifestly be out of place. There are, however, certain phases of the subject that may properly be touched upon because of their intimate relation to the subject of the lessons—brief-making and the use of law books. Preliminary work is often done to little purpose, for the reason that the results are not systematically worked out and embodied in a convenient and easily accessible form, where they can be turned to at a moment's notice as the necessity arises in the course of the trial. In other words, too little attention is frequently given to the preparation of a comprehensive and well-arranged trial brief.

§ 2. The Theory of the Case

The first aim in the search for authorities is the ascertainment of a proper theory of the case. The theory of the case has been defined as "a comprehensive and orderly mental arrangement of principles and facts, conceived and constructed for the purpose of securing a judgment or decree of a court in favor of a litigant."[1] Another writer defines it as the particular line of reasoning of either party to a suit, which aims to bring together certain facts of the case in a certain order or logical sequence, and to correlate them in such a manner as to produce in the mind a definite result or conclusion, which the advocate believes entitles him to the judgment or decree of the court, in view of the application to such result or conclusion of certain principles of law.[2] The theory thus constructed lies at the foundation of the case. Not only must the pleadings be drawn in accordance therewith; but if the trial is to be conducted in a logical, orderly, and forceful manner, productive of the best results, the introduction of evidence, the request for instructions, and the argument to the court must follow the theory and be governed by it.[3]

The importance of a well-defined theory of the case does not end with the trial court. The theory on which the case is tried in the lower court must be adhered to on appeal.[4] Thus, if the theory of the case on the trial is that a contract is valid, the party cannot on appeal assert its illegality.[5] So, if the action is in tort, the plaintiff cannot on appeal base his right to recover on contract. This principle does not, of course, prohibit the adoption of a new line of argument or authorities. Within the scope of the theory of the case, a party may bring to his aid all arguments and authorities he may command. The rule simply prohibits the taking of a new general position or the presentation of a new and independent issue.

§ 3. The Provisional Hypothesis

In seeking a sound theory, the first step must consist in the formulation of a provisional hypothesis as a guide in the search for authorities. The hypothesis thus provisionally adopted may or may not prove to be

[1] Elliott, General Practice, vol. 1, § 93. [2] Robbins, American Advocacy, p. 7.
[3] Terre Haute & I. R. Co. v. McCorkle, 140 Ind. 613, 40 N. E. 62.
[4] Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, 52 C. C. A. 95.
[5] Russell v. Rosenbaum, 24 Neb. 769, 40 N. W. 287.
[6] Lockwood v. Quackenbush, 83 N. Y. 607; Salisbury v. Howe, 87 N. Y. 128.

the final theory of the case. Of necessity, it must at first be only an hypothesis—a guess. It merely gives a definite direction to the search for authorities. A thorough investigation may show that it is wholly false. But even in such a case it may lead to a real solution of the problem, and enable the investigator to formulate the true theory of the case. That is to say, a comprehensive study pursued along the line of a false hypothesis may lead to a line of authorities pointing out the real principle by which the case is governed. Of course, in many instances, the working hypothesis will, on investigation, prove to be correct, and thus become the theory of the case.

The formulation of a provisional hypothesis, to be of value, requires a careful and discriminating analysis of the facts and the law. Although provisional, it must be thorough; for carelessly and hastily drawn conclusions lead only to distorted views. The more carefully this provisional hypothesis is searched for and tested, the more certainly will the investigation of the case along the lines indicated by such hypothesis lead to the theory sought.

§ 4. Choice of a Theory

The problem presented by the statement of facts may, sometimes, be capable of solution on more than one theory. The most familiar examples are the cases in which the party may have a remedy both at law and in equity, and those cases under the facts of which the party may sue on contract or in tort. In the first class of cases the question of submission to a jury, or the character of the relief desired, or the personal responsibility of the defendant, may be controlling in the selection of the theory. A choice between tort and contract is frequently to be determined by the question of proof; that is to say, that theory should be adopted under which it is most easy to prove the case.

Sometimes a fact essential under one theory cannot be proved, whereas under the other theory all the essential facts can be established. For example, suppose the plaintiff purchases a tract of land from defendant at a price of $100 per acre. On the representation that there are 100 acres in the tract he pays defendant $10,000. It is subsequently discovered that there are only 90 acres in the tract. The plaintiff's attorney brings his action for fraud. He is unable to recover, because he cannot prove the fraudulent intent of the vendor; whereas, if he had brought his action on the contract, he might have recovered on the ground that money paid for land in excess of the real quantity, on representations made by the vendor which were untrue, though not fraudulent, may be recovered back.[1] Here the theory of the case was wrong, because of lack of facts to sustain it.

Again, where the action might be in tort or contract, the choice of a theory may be determined by the fact that the period within which the cause of action on contract would be barred differs from the period within which an action in tort, arising out of the same facts, would be

[1] Salisbury v. Howe, 87 N. Y. 128.

barred. So, too, the rules as to amount of the damages recoverable may be decisive of the question, or one may choose a theory which will enable him to join several different counts in the same declaration, or complications in regard to parties may determine one whether to sue in tort or contract.

Most commonly, however, there is really no choice, and among a number of apparent theories only one is legally tenable. Many a case is lost which might have been won, had the suit been brought on a different theory. The difficulty in such cases consists in a misapprehension of the rules of law, in a misunderstanding of the facts, or in a misapplication of legal principles. These three sources of danger must be avoided. A mistake in any one will produce an unsound theory, upon which no recovery can be had. Thus, if one wished to sue for personal injuries suffered by a brakeman in a railroad collision, he might lose his case under the fellow servant rule if he proceeded on the theory that the negligence of the engineer caused the injury; whereas he might recover on the theory that the accident happened by reason of a dangerous combination of tracks, switches, or other elements which made an unsafe place in which to work. Or he might be forced to admit the engineer's negligence as the immediate cause of the collision, but might, perhaps, escape the fellow servant rule by adopting the theory that the railroad company negligently employed an incompetent man in that position. It is frequently a difficult thing to determine what particular breach of duty on defendant's part caused an injury, and a case which would be lost on a theory involving one breach of duty might be won on a theory based upon another.

The books are full of cases where a party has gone into equity only to find that he has mistaken the true theory of his case and must sue at law. An action is often brought on the theory of a quasi contract which should have been brought on the theory that the contract was express or implied, and vice versa. The statute of frauds may frequently be avoided by a little ingenuity in selecting a theory. Illustrations of the importance of this problem of developing a proper theory upon which to sue might be indefinitely extended. Upon the lawyer's success in solving it will very often depend the success or failure of the case.

In those jurisdictions where the practice of setting up the same cause of action in different counts is permitted, it is often prudent to prepare for trial on more than one theory, if the attorney is in doubt as to the precise rule of law applicable to the case, or as to what the evidence will disclose. In such cases each theory must be embodied in a separate count, and must be worked out in the same way and with the same care as if there were no other. At the trial the attorney can thus avail himself of whatever one of several legal principles may appeal to the judge as the true rule in the case, or of whatever state of facts may be brought out in the evidence.

§ 5. Theory of Defendant

What has been said regarding the theory of the case, though apparently referring to the plaintiff's case alone, is in large part equally applicable to the defense. That is to say, the attorney for the defense should work out his theory of the case along similar lines, by a careful analysis of the facts and an investigation of authorities, for the purpose of discovering the principles controlling the facts. A logical, consistent, and sound theory is as important to a successful defense as it is to the plaintiff's case.

§ 6. Theory of the Case as Modified by Adversary's Theory

In order that his client's case should be fully safeguarded, the attorney should, in formulating his theory of the case, take into careful consideration the theory of his adversary as disclosed in the pleadings. If the theory is not discoverable there, he should, from his own standpoint, try to discover on what possible theory his adversary may rely, and prepare to meet it. If his search for the law has been properly pursued with the view of exhausting the authorities, he has probably discovered a number of cases adverse to his theory. A study of these authorities will doubtless disclose to him the possible answers to his theory. In other words, the attorney should prepare the law of his opponent's case as well as his own, thus qualifying himself to meet the counter attack of his adversary and to defend his own position. This study of his opponent's theory will also show him wherein his own theory of the case is weak, thus enabling him to modify it in order to meet and overcome that of his opponent.

§ 7. The Trial Brief

The results of his thorough and careful study of the facts and law should be embodied in a trial brief. Such a document, though in use to some extent, is by no means common. Generally the only brief in use is the brief on appeal, which is prepared for the use of the appellate court. Any abstract or memorandum intended as a guide in the trial of the case may be called a "brief." In England the solicitor prepares a "brief" for the use of the barrister; but this brief is only an abstract of the pleadings and facts to inform the barrister what the case is, and does not in any way deal with the law of the case. The trial brief, with which this and the following sections are concerned, partakes somewhat of the nature of both the English brief and the American brief on appeal. It is intended for the guidance of the attorney at the trial, however, and not primarily to assist the court, though it is sometimes handed to the trial judge at the conclusion of the argument, when questions of law are reserved.

The importance of the trial brief can hardly be overestimated. The proper preparation of the brief means a thorough study and analysis

of the facts, a careful and exhaustive search for authorities, which must in turn be thoroughly analyzed, compared, and weighed to determine their value, and, finally, an arrangement of the facts and the law in logical order, corresponding to the theory of the case. To the young lawyer this sort of preparation for trial is invaluable, insuring, as it does, a thorough preparation difficult to obtain otherwise. In the larger offices, where one member of the firm does the court work, while other members or the clerks in the office prepare the cases for trial, the trial brief is almost indispensable.

§ 8. Form and Contents of Trial Brief

The trial brief, since it is for the guidance of the trial attorney, should contain all the information necessary to enable him to properly introduce the evidence in accordance with the issues and the theory of the case and to present the law in support of that theory. It should therefore contain the following elements: (1) An abstract of the pleadings; (2) a statement of the facts to be proved; (3) a brief of the evidence; (4) a statement of the facts to be proved by the adversary; (5) a brief of the law of the case.

§ 9. Same—Abstract of the Pleadings

The trial attorney must have clearly in mind at all times the exact issues raised by the pleadings. This is essential, not only to the proper introduction of evidence on behalf of his client, but also to prevent the introduction of incompetent evidence by the other party. Consequently it is important that the trial brief should contain an abstract of the pleadings of both plaintiff and defendant. This abstract should be full enough to show clearly the issues in the case. If the pleadings themselves are voluminous, there should be inserted in the abstract references to the pages, folios, or counts of the pleadings, in order to facilitate reference to the original, should such reference become necessary.

§ 10. Same—Statement of Facts to be Proved

It is important that the trial brief should also contain a statement of the facts which must be proved in order to sustain the cause of action or the defense. Cases have sometimes been lost because the attorney has, in his eagerness to reach the disputed facts in the case, overlooked some portion of the formal proof, which was, nevertheless, essential to his case. Thus attorneys have been known to overlook such an essential part of the case as the venue in a criminal prosecution, or have forgotten to prove a demand in cases where a demand is necessary to the right of action. Therefore, to guard against such accidents, the trial brief should contain a schedule of the facts which must be proved, with the names of witnesses by whom proof can be made.

§ 11. Same—Brief of the Evidence

The brief of the evidence should not be arranged wholly in order of the facts, but, in so far as the oral testimony is concerned, by the names of the witnesses in the order in which they are to be called, with a synopsis of the facts to be testified to by each witness. In preparing the brief, if the synopsis is checked with the statement of facts to be proved, the danger of overlooking any fact necessary to be proved is as nearly as possible eliminated, and, by attention to the details of the proof, the necessity of recalling a witness for the purpose of bringing out some fact that has been overlooked is avoided.

If part of the proof is documentary, the nature of the document and the facts for which it is proof should be included in the brief of evidence, as far as possible in connection with the evidence of the witness who is to identify or prove the document. If the documents themselves are arranged in the same order, their introduction in evidence is facilitated.

It may be that the attorney can anticipate that certain objections will be raised to the admission of some of the evidence. If such is the case, he should prepare himself on the law relating thereto, and, in connection with the evidence itself, abstract and cite the authorities on which he relies to oppose or obviate the objection. If for any reason, such as the length of the abstract or the number of citations, it does not seem advisable to insert such matter in the brief of evidence, it can be briefed on a subsequent page, with proper reference to the place where it can be found.

§ 12. Same—Facts to be Proved by Adversary

Reference has been made to the necessity of preparing the adversary's case. To the extent that the attorney may be able to anticipate the adversary's theory, he should also include in the trial brief a statement of the facts necessary to sustain that theory. In so far, too, as he can anticipate his adversary's evidence and mode of proof, he should formulate his objections to the proof and prepare the law to sustain such objections.

§ 13. Same—The Law of the Case

To be of real value, the trial brief must cover both the facts and the law of the case. The two are interdependent. Facts alone are meaningless. Legal principles alone are without significance. It is only when the two are properly brought together that rights and liabilities can be determined. Hence the trial brief, while it may, perhaps, be less exhaustive as a presentation of legal argument than the brief on appeal, must nevertheless contain a full reference to the authorities upon which the theory of the case and all its incidents depend. It should contain in itself a sufficient statement of the law, as well as

of the facts, to fully sustain every contention which the attorney may find it necessary to make in connection with every phase of his case.

(a) *Briefing Statutes*

If it is determined that the case is governed or in any way affected by a statute or a provision of the constitution, such statute or provision should be set out in the trial brief. If too long to be quoted in full, those portions which are of chief importance should be literally transcribed and the other portions abstracted. Usually so much depends upon the exact wording of a constitutional or statutory enactment that it is unsafe to rely to any great extent upon abstracts or condensations. There should be appended to the quotation or abstract full references to all important cases in which the provision has been construed, so that the trial brief may show on its face the exact meaning and scope which the courts have assigned to it.

(b) *Briefing the Case Law*

In cases which turn largely upon issues of fact, and in which no difficult questions of law are involved, this feature of the trial brief will be comparatively simple. But many cases are complicated by legal principles which are themselves in a state of doubt and confusion, or by facts which give rise to many serious perplexities as to the rules of law properly applicable thereto. Whenever such legal questions are involved, the trial brief should cover them clearly and comprehensively. Each proposition of law involved should be concisely set out, followed by citations of cases supporting it, with abstracts of the more important decisions, sufficiently full to show their scope and application. Such abstracts should be carefully prepared, and should be strictly honest, uncolored by the personal views or prejudices of the attorney. Words of comment may be added to indicate points of special strength or weakness in the decision, but such comment should form no part of the abstract of the case.

It is often a matter of some difficulty to determine to what extent the citation and abstracting of cases should be carried in the trial brief. An exhaustive search will usually result in the discovery of a large number of authorities. How many of them should appear in the trial brief? Probably all those which are binding upon the court which tries the case should be cited, and the more important of them abstracted. If there is a dearth of such cases in that jurisdiction, resort must be had to decisions in other jurisdictions; those being selected which are the best reasoned and which are most nearly parallel to the case at bar. In any event it is better to have too many than too few, and usually, if a case is worth mentioning, it is worth being quoted from or briefly abstracted. Cases not used in the trial brief should, nevertheless, be preserved, if of any value, as they may be needed in preparing the brief on appeal, should the case be taken up.

Cases which are likely to be used as authorities by the other party should also be abstracted, with comments thereon, showing, if possible, wherein they may be distinguished, or pointing out circumstances tending to impair their value, if such can be found.

(c) *Instructions for the Jury*

It is advisable that there be included in the trial brief a draft of such instructions as the attorney believes should be given and which he intends to ask the court to give. He cannot always determine beforehand all the instructions he may wish to request; but he can anticipate many of them, and his preliminary draft will prove very helpful when the time comes to present his requests to the court. Such draft should be accompanied by ample references to the authorities upon which the instructions are based, or to such parts of the trial brief as cover the points of law involved in the instructions.

§ 14. Use of the Trial Brief

Though the most important general purpose served by the trial brief is its use for the guidance of the attorney on the trial of the cause, in the introduction of evidence, and the argument of the questions of law arising during the trial, the brief may be of considerable use after the trial is over. The information it contains may be of great value in the event of a motion for a new trial or a motion in arrest of judgment; and if an appeal is taken the existence of a well-prepared trial brief will be found to save an immense amount of labor. As the theory on which the case was tried must be adhered to on appeal, such a brief, supplemented by notes taken on the trial, will bring to hand the larger portion of the material necessary in the preparation of the brief to be filed in the appellate court.